Office - Supreme Court, U.S.
FILED
AUG 2[illegible] 1982
ALEXANDER L. STEVAS,
[illegible]

No. 81-2267

In the Supreme Court of the United States

OCTOBER TERM, 1982

FIRST NATIONAL BANK OF SCOTIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Fidelity Federal Savings & Loan Association v. *de la Cuesta*, No. 81-750 (June 28, 1982) 3

Gulf Federal Savings & Loan Association v. *Federal Home Loan Bank Board*, 651 F. 2d 259, cert. denied, No. 81-1744 (July 2, 1982) 2, 3

Otero Savings & Loan Association v. *Federal Home Loan Bank Board*, 665 F. 2d 279 ..... 2, 3

Statutes:

12 U.S.C. 371d 1

12 U.S.C. (& Supp. IV) 1818 1

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-2267

FIRST NATIONAL BANK OF SCOTIA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, a national bank and two of its principal officers, petition for review of the court of appeals' refusal (Pet. App. A-1 to A-10) to set aside a modified cease and desist order issued by the Comptroller of the Currency pursuant to 12 U.S.C. (& Supp. IV) 1818 (Pet. App. B-1 to B-10). The order to cease and desist previously had been reviewed and upheld by the court of appeals, and this Court denied certiorari on November 9, 1981 (No. 81-322). Petitioners now challenge only that aspect of the Comptroller's modified order that requires the Bank to maintain an eight percent ratio of equity capital to total assets.[1]

---

[1]The first petition for writ of certiorari challenged the Comptroller's finding, affirmed by the court of appeals, that the Bank had violated the provisions of 12 U.S.C. 371d by an overinvestment in its branch office.

Petitioners contend that the court of appeals erred in upholding the eight percent ratio requirement and that the decision below is inconsistent with the decisions in *Gulf Federal Savings & Loan Association* v. *Federal Home Loan Bank Board*, 651 F. 2d 259 (5th Cir. 1981), cert. denied, No. 81-1744 (July 2, 1982), and *Otero Savings & Loan Association* v. *Federal Home Loan Bank Board*, 665 F. 2d 279 (10th Cir. 1981). But those claims are based on the incorrect assertion that "the undisputed record demonstrated that the requirement would be detrimental to [the Bank's] financial soundness" (Pet. 22). Although petitioners pressed that interpretation of the record on the court below, that court rejected it, "find[ing] sufficient evidence in the record to support the Comptroller's conclusion that there are a number of ways for the Bank to comply with the 8% ratio requirement without undue hardship" (Pet. App. A-8).[2] There is no need for this Court to reconsider that essentially fact-bound issue.[3] In any event, the record shows that the order, rather than being injurious to the Bank, is necessary and beneficial to protect the Bank from possible insolvency (J.A. II 50). The eight percent ratio requirement

---

[2]Contrary to petitioners' assertion (Pet. 29-31), a sale of assets is not the only way the Bank can reach the required ratio. The Bank can raise capital through a variety of methods, including the sale of additional stock and the retention of earnings. The Bank can also limit its growth by placing restrictions on new deposits and loan applications. Should the Bank determine to reach the required ratio primarily through the sale of assets, the Bank need not sell only its "high-yielding assets." Moreover, even if such a sale were to result in some loss to the Bank, any short-term, one-time loss the Bank may incur in this process is minimal when compared to the prospect of the Bank failing due to a capital insolvency.

[3]The original cease and desist order, which this Court declined to review in No. 81-322, would have required the Bank to increase its equity capital to $1.5 million by the end of 1980, providing an equity capital ratio of 8.1% at that time. The modified order no more merits this Court's review than did the original one.

is accordingly "well within the Comptroller's broad authority to require actions to remedy undercapitalization resulting from unsafe and unsound practices" (Pet. App. A-6 to A-7).[4]

In light of the court of appeals' interpretation of the record, this case presents no conflict with *Gulf Federal Savings & Loan Association, supra,* or with *Otero Savings & Loan Association, supra.* In each of those cases, the court of appeals concluded that the bank regulatory agency's order was unauthorized because it was not calculated to improve the financial condition or to protect the solvency of the financial institution involved—in *Gulf Federal* because the loss of public confidence resulting from the charging of undisclosed interest was insufficiently related to the bank's financial soundness (651 F. 2d at 264-265), and in *Otero* because the order was designed to punish the bank for its former practices (665 F. 2d at 288-289). Accordingly, even if this limited view of the bank regulatory agencies' authority has survived this Court's decision in *Fidelity Federal Savings & Loan Association* v. *de la Cuesta,* No. 81-750 (June 28, 1982), slip op. 10 n.9, 17-24, the Comptroller's order here, which does protect the bank from the risks of under-capitalization, was proper.

---

[4]Petitioners assert (Pet. 38 n.24) that the eight percent ratio requirement is inconsistent with the Comptroller's capital adequacy guidelines (Pet. App. D-1 to D-10). But those guidelines do not apply to institutions, like the Bank here, that are under special supervision (Pet. App. D-4 n.1). As the court of appeals recognized (Pet. App. A-7), the Comptroller may reasonably "require a higher than average ratio for a bank that has been found to be in danger of capital insolvency because of unsafe and unsound banking practices."

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1982